Datuk Bandar Kuala Lumpur v Zain Azahari bin Zainal Abidin

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–04–35–94
GOPAL SRI RAM, SITI NORMA YAAKOB AND AHMAD FAIRUZ JJCA
17 FEBRUARY 1997

Local Government *— Town Planning — Approval of permission — Permission resulted in an increase in residential density — Whether the Mayor may grant approval without resorting to formality provided in the Planning and Development Rules 1970 — Federal Territory (Planning) Act 1982 s 64 — Planning and Development Rules 1970 r 2(3)*

Administrative Law *— Exercise of administrative powers — Local authority — Planning permission resulted in an increase in residential density — Whether discretion to grant planning permission was properly exercised — Whether lack of admissible evidence to support exercise of discretion — Federal Territory (Planning) Act 1982 s 22*

Local Government *— Town Planning — Approval of permission — Planning permission resulted in an increase in residential density — Whether discretion to grant planning permission was properly exercised — Whether lack of admissible evidence to support exercise of discretion — Federal Territory (Planning) Act 1982 s 22*

The appellant was the Mayor of the city of Kuala Lumpur. In the exercise of his powers, he approved the development application of Tradium Sdn Bhd ('Tradium'), granting Tradium approval to erect a three-storey building on its land, thus increasing the population density of the locality. The respondent was an adjacent landowner who occupied a single family dwelling on his property. He challenged the appellant's order by applying to the High Court for certiorari. The High Court granted certiorari, reasoning that the appellant had acted in excess of his jurisdiction when he granted the order, as he had increased the population density of the locality without resorting to the provisions of the Planning and Development Rules 1970 ('the 1970 Rules') as required by s 64 of the Federal Territory (Planning) Act 1982 ('the Act') and r 2(3) of the 1970 Rules.

The appellant appealed, stating that the reasoning of the High Court was wrong, as in the light of legislative history and practical realities, resorting to s 64 every time a planning application was made would cause all development in Kuala Lumpur to grind to a halt because of the delays that making a rule and gazetting the same would cause.

The respondent argued in favour of the High Court's ruling by relying on s 22 of the Act, which deals with the powers and discretion of the appellant to grant planning approval, citing the appellant's failure to submit an affidavit setting out his reasoning for granting the planning approval, and the lack of admissible evidence to explain his failure to submit the same.

On the other hand, the appellant argued that it was his function and not the court's to determine the planning of Kuala Lumpur,

because the appellant is best suited to carry out this task. Furthermore, the appellant's decision in the light of the circumstances was not unreasonable and hence nothing turns upon the absence of the affidavit.

Held, dismissing the appeal:

(1) When s 22 of the Act and r 2(3) of the 1970 Rules were read together, it was implicit that the appellant was authorized to grant planning permission involving an increase in residential density in the locality of the proposed development without resorting to any further formality. To rule otherwise would cause practical delays which would result in all development in Kuala Lumpur coming to a halt. Thus, the High Court erred in its reasoning that the appellant was required to make a rule and gazette the same in order to make his development order valid (see pp 27F–G and 28H).

(2) The powers and discretion granted to the appellant under s 22 of the Act must be exercised reasonably and in accordance with the terms of the Act. When the exercise of discretion was challenged on the grounds of its unreasonableness, the court was able to examine the decision making process as well as to consider the merit of the decision itself. Also, a public decision-maker whose exercise of discretion was questioned must meet the challenge by adducing relevant and admissible evidence.

As such, the appellant was required to submit admissible evidence to support his exercise of discretion. Applications for certiorari were normally contested on affidavit evidence. The court could not compel either party to submit affidavits, but if a party did choose to submit an affidavit to be considered, it must be admissible evidence. The appellant's affidavit was inadmissible hearsay, and thus there was no evidence to support the appellant's decision (see pp 31A–B, 32D–E, F–H and 33B); *Pengarah Tanah dan Galian Wilayah Persekutuan v Sri Lempak Enterprise Sdn Bhd* [1979] 1 MLJ 135, *R Rama Chandran v Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145, *Majlis Perbandaran Seberang Perai v Tropiland Sdn Bhd* [1996] 3 MLJ 94, *Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789 followed.

Obiter:

(1) Although a point was already decided in an appellant's favour in the court of first instance, it was certainly open to a respondent to take it before the appellate court and argue that the learned judge's judgment should be upheld for other reasons. However, two conditions must be met.

First, a respondent should give adequate notice to an appellant of his intention to raise the argument. Second, the point must be a live one, in the sense that it was raised in the court below and was not at any stage abandoned (see p 23E–F); *Thomas v Marconi's Wireless Telegraph Co Ltd* [1965] 1 WLR 850 and *Ho Kean v Kong Lai Soo* [1974] 2 MLJ 63 followed.

(2) The appellant, not the court, should decide whether the planning approval should be granted or refused, as the former had access to the information and material which for good reason was denied to the court (see p 35G).

[Bahasa Malaysia summary

Perayu merupakan Datuk Bandar bandaraya Kuala Lumpur. Dalam pelaksanaan kuasanya, beliau telah meluluskan permohonan pemajuan Tradium Sdn Bhd ('Tradium'), dengan memberikan Tradium kelulusan untuk mendirikan sebuah bangunan tiga tingkat atas tanahnya, justeru itu menambahkan kepadatan penduduk kawasan itu. Penentang merupakan seorang tuan punya tanah yang bersebelahan yang menduduki sebuah kediaman setingkat atas hartanya. Dia telah mencabar perintah perayu dengan memohon kepada Mahkamah Tinggi untuk certiorari. Mahkamah Tinggi telah memberikan certiorari, dengan menaakul bahawa perayu telah bertindak melampaui bidang kuasanya apabila membenarkan perintah itu, kerana beliau telah menambahkan kepadatan penduduk kawasan itu tanpa menggunakan peruntukan Kaedah-Kaedah Perancangan dan Pembangunan 1970 ('Kaedah 1970') seperti yang dikehendaki oleh s 64 Akta (Perancangan) Wilayah Persekutuan 1982 ('Akta tersebut') dan k 2(3) Kaedah 1970.

Perayu membuat rayuan, dengan menyatakan bahawa taakulan Mahkamah Tinggi adalah salah, oleh kerana memandangkan sejarah perundangan dan realiti praktikal, pemakaian s 64 setiap kali suatu permohonan perancangan dibuat akan menyebabkan semua pembangunan di Kuala Lumpur tergendala akibat kelewatan yang disebabkan oleh pembuatan dan pemerwartaan kaedah-kaedah.

Penentang berhujah memihak kepada pendapat Mahkamah Tinggi dengan bergantung kepada s 22 Akta tersebut, yang berhubung dengan kuasa dan budi bicara perayu untuk memberikan kelulusan perancangan, dan dengan menyebut kegagalan perayu untuk menyerahkan afidavit yang menyatakan taakulannya atas pemberian kelulusan perancangan, dan kekurangan keterangan yang boleh diterima bagi menjelaskan kegagalannya untuk menyerahkan yang sama.

Sebaliknya, perayu berhujah bahawa ia merupakan fungsinya sendiri dan bukan fungsi mahkamah untuk menentukan perancangan Kuala Lumpur, sebab perayu adalah dalam kedudukan yang paling baik untuk melaksanakan tugas ini. Tambahan pula, memandangkan keadaan keputusan perayu bukanlah tidak munasabah dan justeru itu tiada apa yang timbul daripada ketiadaan afidavit.

Diputuskan, menolak rayuan:

(1) Apabila s 22 Akta tersebut dan k 2(3) Kaedah 1970 dibaca bersama, adalah tersirat bahawa perayu diberi kuasa untuk memberikan kebenaran perancangan yang melibatkan penambahan dalam kepadatan kemastautinan dalam kawasan pembangunan yang dicadangkan tanpa menggunakan sebarang formaliti lanjut. Keputusan sebaliknya akan mengakibatkan kelewatan

praktikal yang akan pula mengakibatkan pemberhentian semua pembangunan di Kuala Lumpur. Oleh itu, Mahkamah Tinggi telah melakukan kesilapan dalam taakulan bahawa perayu dikehendaki membuat kaedah dan mewartakannya untuk menjadikan perintah pembangunan sah (lihat ms 27F–G dan 28H).

(2) Kuasa dan budi bicara yang diberikan kepada perayu di bawah s 22 Akta tersebut mesti dilaksanakan secara munasabah dan dengan menurut terma Akta tersebut. Apabila pelaksanaan budi bicara dicabar atas alasan ketidakmunasabahan, mahkamah dapat memeriksa proses membuat keputusan dan juga mempertimbangkan merit keputusan itu sendiri. Juga, pembuat keputusan awam yang melaksanakan budi bicara yang dipersoalkan mesti memenuhi cabaran dengan mengemukakan keterangan yang relevan dan boleh diterima.

Oleh yang demikian, perayu dikehendaki menyerahkan keterangan yang boleh diterima bagi menyokong pelaksanaan budi bicaranya. Permohonan untuk certiorari biasanya dicabar atas keterangan afidavit. Mahkamah tidak boleh memaksa mana-mana pihak untuk menyerahkan afidavit, tetapi jika sesuatu pihak memilih untuk menyerah afidavit supaya dipertimbangkan, ia mestilah merupakan keterangan yang boleh diterima. Afidavit perayu adalah dengar cakap yang tidak boleh diterima, dan oleh itu tiada keterangan untuk menyokong keputusan perayu (lihat ms 31A–B, 32D–E, F–H dan 33B); *Pengarah Tanah dan Galian Wilayah Persekutuan v Sri Lempak Enterprise Sdn Bhd* [1979] 1 MLJ 135, *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145, *Majlis Perbandaran Seberang Perai v Tropiland Sdn Bhd* [1996] 3 MLJ 94 dan *Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789 diikut.

Obiter:

(1) Walaupun sesuatu hujah diputuskan memihak kepada perayu di mahkamah pertama, ia adalah terbuka kepada seseorang penentang untuk mengambilnya di hadapan mahkamah rayuan dan berhujah bahawa penghakiman hakim yang arif harus dibenarkan atas alasan yang lain. Namun demikian, dua syarat mesti dipenuhi.

Pertama, penentang harus memberikan notis yang secukupnya kepada perayu tentang hasratnya untuk menimbulkan hujah itu. Kedua, hujah itu mestilah merupakan suatu yang hidup, dalam ertikata ia ditimbulkan di mahkamah bawah dan tidak ditinggalkan di mana-mana tahap (lihat ms 23E–F); *Thomas v Marconi's Wireless Telegraph Co Ltd* [1965] 1 WLR 850 dan *Ho Kean v Kong Lai Soo* [1974] 2 MLJ 63 diikut.

(2) Perayu, dan bukannya mahkamah, harus memutuskan sama ada kelulusan perancangan patut diberikan atau ditolak, kerana perayu mempunyai akses kepada maklumat dan material yang tidak

dikemukakan kepada mahkamah atas alasan yang baik (lihat ms 35G).]

Notes

For cases on town planning, see 10 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 162–164.

For cases on the exercise of administrative powers, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1–50.

Cases referred to

Ho Kean v Kong Lai Soo [1974] 2 MLJ 63 (refd)

Kantamani Venkata Narayana & Sons v First Additional Income Tax Officer, Rajahmundry AIR 1967 SC 587 (refd)

Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh [1997] 1 MLJ 789 (folld)

Madhya Pradesh Industries Ltd v The Income Tax Officer, Nagpur AIR 1970 SC 1011 (refd)

Majlis Perbandaran Seberang Perai v Tropiland Sdn Bhd [1996] 3 MLJ 94 (folld)

Narayanappa v Commissioner of Income Tax, Bangalore AIR 1967 SC 523 (refd)

New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries [1988] 1 NZLR 544 (refd)

Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135 (folld)

R v Barnsley Metropolitan Borough Council, ex p Hook [1976] 1 WLR 1052 (refd)

R v Lewes Justices, ex p Home Secretary [1973] AC 388 (refd)

R Rama Chandran v Industrial Court of Malaysia & Anor [1997] 1 MLJ 145 (folld)

Rohana bte Ariffin v University Sains Malaysia [1989] 1 MLJ 487 (refd)

Thomas v Marconi's Wireless Telegraph Co Ltd [1965] 1 WLR 850 (refd)

Legislation referred to

City of Kuala Lumpur (Planning) Act 1973 s 6
Courts of Judicature Act 1964 Schedule para 1
Emergency (Essential Powers) Ordinance (No 46 of 1970)
Federal Territory (Planning) Act 1982 ss 2, 22, 64(1), 65(2)(a)
Federal Territory (Planning) (Zoning and Density) Rules 1985
Planning and Development Rules 1970 r 2(3)
Town Boards Enactment (FMS Cap 137) Pt IX

Appeal from: Originating Motion No K1–25–118–92 (High Court, Kuala Lumpur)

Zaki Tun Azmi (*Vishnu Kumar* with him) (*Rashid & Lee*) for the appellant.
Hj Sulaiman Abdullah (*Anita Sockalingam* with him) (*Zain & Co*) for the respondent.

Cur Adv Vult A

Gopal Sri Ram JCA (delivering the judgment of the court): The Datuk Bandar of Kuala Lumpur has appealed to this court to reverse an order of certiorari issued by the High Court quashing a building approval given by him. We heard oral argument in the appeal on 26 November 1996 after which we granted counsel leave to supplement their submissions by putting in a written note. We then reserved judgment. Counsel having filed their written submissions, we are now in a position to pronounce our decision and provide reasons for it. B

The matters relevant to the appeal arose in this way.

Jalan U Thant is quite a prestigious part of the city. It is mainly residential. Many foreign missions have their offices in the vicinity. The official residences of several ambassadors and High Commissioners are also located along Jalan U Thant and the neighbouring road, Jalan Langgak Golf. All this is common knowledge. C

The respondent is the registered proprietor of a piece of land along Jalan U Thant. There is a dwelling house on the respondent's land. It is a bungalow. The respondent and his family reside there. D

A company called Tradium Sdn Bhd ('Tradium') also owns property in the same area. It is located along Jalan Langgak Golf. But it is adjacent to the respondent's property and shares a common boundary with the respondent's land. For convenience, we will refer to it as 'the subject property'. At some point in time, there was also a bungalow on the subject property. E

Tradium wanted to develop the subject property by demolishing the bungalow and constructing a three-storeyed apartment building. The development involved an increase in the population density ratio. To do all this, Tradium required approval from the appellant. It submitted its plans. F

On 4 October 1990, the appellant approved the development proposed by Tradium and issued an order ('the first development order'). In the result, there was an increase in residential density of the locality from 11 persons per acre to 56 persons per acre. G

The respondent was not notified of Tradium's proposed development before the first development order was issued. He was given no opportunity to object to it although he had a right to do so. There had been procedural unfairness. This is a concept of wider import than the expression 'natural justice'. It has its roots in the Federal Constitution. It was first introduced into our jurisprudence by the classic judgment of Edgar Joseph Jr J (as he then was) in *Rohana bte Ariffin v University Sains Malaysia* [1989] 1 MLJ 487. That decision has had an extremely beneficial impact upon, and has forever changed, the approach of our courts to administrative law in this country. H I

The respondent came to know about the first development order. He applied to have it quashed. He succeeded. The same judge who heard the present case also heard the earlier application. But he did not remit the matter to the appellant for re-consideration. There has been some argument

about it before us on the effect of this omission. We think that it may be conveniently dealt with at this juncture.

Counsel for the respondent informed us that the appellant had made an application to have the matter remitted but that the judge had refused it. He said that the refusal had serious consequences. The development order was valid for only a year. It lapsed after that. Since the judge had not remitted the original application back to the appellant for re-consideration, there was nothing for the appellant to re-consider. Therefore, Tradium had to make a fresh application. It did not. So, there was nothing before the appellant on which he could make a decision.

The respondent took this point in the court below. But the judge thought there was nothing in it. He said so in his judgment.

Dato' Zaki Tun Azmi, who also appeared for the appellant in the earlier proceedings, told us quite frankly that he had no recollection of having made such an application. He had, however, argued that the judge was correct in rejecting the respondent's argument.

Was it open for the respondent to argue this point before us? We think it was.

Although a point is decided in an appellant's favour in the court of first instance, it is certainly open to a respondent to take it before this court and argue that the learned judge's judgment should be upheld for other reasons. But two conditions must be met.

First, a respondent should give adequate notice to an appellant of his intention to raise the argument. Second, the point must be a live one, in the sense that it was raised in the court below and was not at any stage abandoned. The law on the point was settled by the decision of the English Court of Appeal in *Thomas v Marconi's Wireless Telegraph Co Ltd* [1965] 1 WLR 850 which was applied by the Federal Court in *Ho Kean v Kong Lai Soo* [1974] 2 MLJ 63.

In the present case, both conditions had been met. Adequate notice had been given and the point remains alive to be canvassed. However, for reasons that will become apparent later, we find it unnecessary to deal with the argument. By this, we are not to be taken to say that it had, or lacked, merit. It is just that the route we propose to take renders the point academic for present purposes.

With that, we now return to the factual background.

After the first development order had been quashed, the appellant caused an inquiry to be conducted into Tradium's original application for development. The appellant properly delegated the power to conduct the inquiry to one of his subordinate officers. The respondent was given notice of the inquiry. He was away from the country and so did not attend in person. But his solicitor did, and asked for a postponement. The officer conducting the inquiry declined to grant it. We are satisfied — having read the notes of the inquiry kept by the respondent's legal advisers — that no prejudice whatsoever was occasioned to the respondent by the inquiring officer's refusal to grant a postponement. The attending solicitor more than adequately prepared to make all objections to the grant of planning permission. Having examined the material made available to us in the

record of appeal, we are satisfied that procedural fairness in all respects was meted out and that no complaint may be validly made about the conduct of the inquiry. A

After completing the inquiry, the officer concerned sent all the papers to the appellant to make a decision. That is because the appellant had reserved unto himself the power to make the ultimate decision whether or not to grant planning permission to Tradium. B

The appellant decided to approve Tradium's application. In due course, he made known his decision. The respondent was dissatisfied with the decision. He once again moved the High Court for certiorari. He advanced several grounds in support of his application. All but one found no favour with the learned judge. We must now consider the sole ground upon which the judge quashed the appellant's decision. It has been vigorously attacked before us. C

Dato' Zaki had said that in order to understand the point in issue, we must hearken to some of the background and the relevant legislative history. We agree with him. He had carefully taken us through these. We are grateful to him for his assistance. D

The comprehensive planning and development of the city of Kuala Lumpur is comprised in three large plans. They are numbered 1039, 1040 and 1041 respectively. We are only concerned with two of them. They are Plan Nos 1040 and 1041. E

Plan No 1040 is for all the land that comes within what may be conveniently described as 'Metropolitan Kuala Lumpur'. It covers an area of some 36 square miles. Plan No 1041 is in respect of a wider area of the city that does not include those lands falling within Plan No 1040 and which may, for convenience, be termed as 'Greater Kuala Lumpur'. The subject property is located within Metropolitan Kuala Lumpur and for that reason, falls within Plan No 1040. F

All three plans find mention in the legislation that was passed or promulgated from time to time for the purpose of regulating the planning and development of the city. As we perceive it, there are four stages in the relevant legislative history. G

The first stage covers the period before 1970. At that point in time, Kuala Lumpur was the capital of the state of Selangor as well as the Federation. It was then a municipality administered by a commissioner. All aspects of its planning were regulated by Pt IX of the Town Boards Enactment (FMS Cap 137) ('the Enactment'). Further, the planning and development of Kuala Lumpur appeared in three plans numbered L 886, L 887 and L 888 which were prepared and published in 1967. H

The second stage covers the period between 1970 and 1973. In 1970, the Emergency (Essential Powers) Ordinance (No 46 of 1970) ('the Ordinance') was promulgated. It repealed Pt IX of the Enactment. The development of Kuala Lumpur was, by the terms of the Ordinance, to be governed by a comprehensive development plan. Section 4 of the Ordinance described that plan as follows: I

A 4 (1) The plans which were gazetted under the Gazette Notification No 1197/67 as Plan Nos L 886, L 887 and L 888 which have been approved with modifications by the Minister and renumbered as Plan Nos 1039, 1040 and 1041 respectively shall be deemed to be the comprehensive development plan under this Ordinance.

B (2) The comprehensive development plan referred to under sub-s (1) shall be exhibited for public inspection by the Authority at the office of the Commissioner for a period of not less than three months from the coming into force of this Ordinance.

We would add for completeness that pursuant to the power conferred by the Ordinance, subsidiary legislation called the 'Planning and Development C Rules' were made and came into force on 1 October 1970. For reasons that will soon become apparent, the Planning and Development Rules 1970 ('the 1970 Rules') remain in force. The 1970 Rules regulate applications for planning permission and provide forms which are to be used in connection with such applications.

D In 1972, Kuala Lumpur attained city status. It ceased to be the capital of Selangor. It became a Federal Territory. Eventually, the commissioner was replaced by the office of the appellant. The original boundary of the city which had earlier circumscribed the inner city was extended to include Greater Kuala Lumpur.

E The third stage covers the period between 1973 and 1982. In 1973, Parliament passed the City of Kuala Lumpur (Planning) Act ('the 1973 Act') by which the Ordinance was, for constitutional reasons, repealed and re-enacted.

Section 6 of the 1973 Act reads as follows:

F 6 (1) The Plan Nos L 886, L 887 and L 888 gazetted under Gazette Notification No 1197 of 1967 as modified and renumbered by the Minister as Plan Nos 1039, 1040 and 1041 respectively and exhibited in accordance with the provision of s 4(2) of the Emergency (Essential Powers) Ordinance No 46 of 1970 shall be the comprehensive development plan for purposes of this Act.

G (2) On the date this Act comes into force or as soon as possible thereafter, a public notice shall be published in the Gazette to inform the public of the place or places where copies of the Plan Nos 1039, 1040 and 1041 referred to in sub-s (1) may be inspected or where copies may be purchased on payment of the prescribed fees.

H The 1973 Act contained a saving provision under which the Planning and Development Rules were extant.

The fourth and final stage covers the period 1982 until the present day. Parliament passed the Federal Territory (Planning) Act 1982 ('the Act'), which repealed and replaced the 1973 Act. There is a savings provision in the Act. It is s 65(2), of which only para (a) is relevant to this I case. It reads:

(2) Notwithstanding the repeal of the law specified in sub-s (1), which in this Act is referred to as the 'repealed law' —

(a) any rule made under the repealed law shall in so far as it is not inconsistent with the provisions of this Act continue in force and have the like effect as if it had been made under this Act; ... . A

By reason of this provision read with the equipollent section in the 1973 Act, the Planning and Development Rules 1970 remain in force until the present day. B

Before proceeding any further, we note that the instant appeal falls to be decided according to the provisions of the Act and not under any of its precursors.

The Act refers to the 'Comprehensive Development Plan' which it defines in s 2 as follows: C

'Comprehensive Development Plan' means the comprehensive development plan referred to as plans Nos 1039, 1040 and 1041 in the City of Kuala Lumpur (Planning) Act 1973; ... .

There is another definition in the Act which is relevant to the present appeal. It is the expression 'development plan' which the Act defines as follows: D

'development plan', in relation to an area means —

(a) the local plan for the area; or

(b) if there is no local plan for the area, the structure plan for the area; E

and, in relation to any land or building, means the development plan, as so defined, for the area in which the land or building is situated; ... .

The Act also contains a provision that confers power to make subsidiary legislation. It is s 64(1) of the Act, the relevant provisions of which read as follows: F

64 (1) The Commissioner may with the approval of the Minister make rules generally for the better carrying out of the provisions of this Act.

(2) In particular and without prejudice to the generality of the foregoing powers such rules may provide for all or any of the following matters, namely — G

(a) regulating the development of land in relation to proper planning;

(b) the classes of use of land and buildings or parts thereof;

(c) the control of residential density, floor area, plot ratio, plinth area, and uses of buildings or land; ... . H

On 30 October 1985, the appellant caused to be published in the Gazette vide PU (A) 501 certain Rules which had received the Minister's approval on 31 October 1985. In the main, they read as follows:

FEDERAL TERRITORY (PLANNING) ACT 1982
FEDERAL TERRITORY (PLANNING) (ZONING AND DENSITY) RULES 1985 I

IN exercise of the powers conferred by s 64 of the Federal Territory (Planning) Act 1982, the Commissioner of the City of Kuala Lumpur, with the approval of the Minister, makes the following rules:

A (1) These Rules may be cited as the Federal Territory (Planning) (Zoning and Density) Rules 1985.

(2) All lands within the Federal Territory of Kuala Lumpur excluding lands located in plans Nos 1040 and 1041 are hereby zoned as residential with a density of 60 persons per 0.4 hectare.

B For convenience, we shall refer to the foregoing publication as 'the Rules'. We pause to make the following two observations in relation to the subject matter dealt with by the Rules.

First, it is common ground between the parties that in 1970 the population density ratio for Metropolitan Kuala Lumpur was fixed at C 10 persons per acre. It follows that this density ratio was applicable to all lands that came within Plan No 1040. It appears that the same ratio also existed for lands that fell outside the scope of Plan No 1040 and 1041.

The Rules merely increased the population density ratio from 10 persons per acre to 60 persons an acre (0.4 hectare being the equivalent of one acre) over the relevant area. This overall increase is to be distinguished D from any increase in the population density ratio occasioned by the development of a particular piece of land in a given area. That is a matter which falls to be dealt differently. And this brings us to our second observation.

Section 22 of the Act — which we will deal with at length later in this E judgment — confers upon the appellant the power to grant or refuse planning permission in respect of any development. Planning permission may be granted conditionally or unconditionally. The 1970 Rules which regulate the procedure for making applications for planning permission contain a r 2(3) which reads:

F Applications to the Authority for an increase in residential density shall be made in Form 3 of the First Schedule.

When s 22 of the Act is read together with r 2(3) — and we think this is how they should be read — it is implicit that the appellant is authorized to grant planning permission involving an increase in residential density in G the locality of the proposed development without resorting to any further formality.

So much for the background.

We now turn to address the sole ground upon which the learned judge decided the case for the respondent. In his written judgment, the H learned judge reproduced the Rules and s 64 of the Act. He then went on to say as follows:

It is to be noted that before such change can be effected, it needed the approval of the Minister. It was some process and some formality as the Gazette No PU (A) 501 of 1982 clearly show.

I By his approving and issuing a development order over this subject land when the residential density had not been properly changed from 10 persons per acre to the present change; without him having gone through the process, the Datuk Bandar had clearly infringed the existing status, as to the current residential density of the subject land concerned. I am of the view that without having effected that change at the time of the approval of

the development order, the Datuk Bandar was clearly acting in excess of his jurisdiction and acting to the detriment of the rights of the adjoining owner of the land who has a legitimate expectation that the residential density of his lot and that of his neighbouring land would not be changed without the Datuk Bandar having resorted to the provisions of the Rules before a change can be done and the applicant is entitled to expect that the process of change would be faithfully followed by the Datuk Bandar.

By reason of the Datuk Bandar's failure to have the residential density for the subject lot changed at the time of the approval of the development order bringing in its train such change, I find the applicant had succeeded in his application in terms prayed for and I hereby grant an order in terms and quash the decision of the Datuk Bandar granting the development order dated 22 September 1992 with costs to be taxed.

Without loss of content, the learned judge's finding may be summarized thus. The appellant resorted to his rule making power conferred upon him by the Act when he increased the density of the area covered by the Rules. The respondent had a legitimate expectation that the same method would be followed when Tradium's application for planning approval came up for consideration. The appellant was therefore obliged to make a rule increasing the density of the locality in which the subject property is situated. Since he did not do so, the increase in residential density is invalid.

Dato' Zaki criticized the approach adopted by the learned judge. He submitted that if the appellant had to resort to the provisions of s 64 on every occasion an application for planning permission is made by a land owner, all development within Metropolitan and Greater Kuala Lumpur would come to a halt. He said that the learned judge's conclusion was based upon a misappreciation of the facts and the applicable law. With these submissions, we are in agreement.

A distinction must be drawn between cases where the residential density is increased over an area covered by one or more of Plans Nos 1039, 1040 and 1041 and cases where an increase in residential density occasioned by the development by a land owner of his property. The presence of r 2(3) negates any suggestion of a legitimate expectation on the part of the respondent found by the learned judge to exist. As pointed out by the appellant's counsel, if the appellant must formulate and publish in the *Gazette* a formal Rule in respect of each planning permission involving an increase in residential density, the development of the city of Kuala Lumpur would, for all practical purposes, come to a standstill. With respect to the learned judge, we do not glean such a result to have been intended by Parliament when it passed the Act. In our judgment, the learned judge erred in quashing the planning approval in this case upon the ground relied upon by him.

But that is not the end of the matter. Hj Sulaiman of counsel for the respondent has, as we had pointed out very early in this judgment, sought to defend the conclusion of the learned judge upon other grounds advanced before him. We have already referred to one such ground which we have refrained from dealing with. We now propose to address ourselves to one of the other arguments advanced on the respondent's behalf.

It was submitted on the respondent's behalf that the appellant ought to fail in this appeal because the discretion conferred upon him was not exercised in accordance with law. Hj Sulaiman drew our attention to the absence of an affidavit from the appellant setting out the matters that he took into account when granting Tradium planning approval for its development. He said that there was no admissible evidence before the learned judge to explain the absence of such an affidavit. Neither was there any admissible evidence to demonstrate the matters that were taken into account by the appellant when he took his decision.

Dato' Zaki's response to these arguments is as follows.

It is for the appellant and not the court to determine the planning of Kuala Lumpur, since it is the appellant who is best fitted to carry out that task. In any event, the decision to grant planning approval is not unreasonable when one considers all the circumstances of the case. Nothing therefore turns upon the absence of an affidavit from the appellant.

These are important arguments. In order to deal with them, it is necessary, as a first step, to examine the relevant statutory provision that is relied upon by both parties in support of their arguments. That provision is s 22 of the Act which reads as follows:

> 22 (1) The Commissioner shall have power exercisable at his discretion to grant planning permission or to refuse to grant planning permission in respect of any development irrespective of whether or not such development is in conformity with the development plan; provided however the exercise of the discretion by the Commissioner under this subsection shall be subject to the provisions of sub-s (4) and s 23.
>
> (2) Where the Commissioner decides to grant planning permission in respect of a development he may issue a development order —
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> (a) granting planning permission without any condition in respect of the development;
>
> (b) granting planning permission subject to such condition or conditions as the Commissioner may think fit in respect of the development:
>
> Provided that the Commissioner shall not issue a development order under this subsection unless he is satisfied that the provision of s 41 relating to the assessment of development charges has been complied with.
>
> (3) Without prejudice to the generality of para (b) of sub-s (2), the Commissioner may impose any or all of the following conditions —
>
> (a) the effect that the development order granting planning permission in respect of any change of use of land or building is only for a limited period and after the expiry of that period the use of the land or building as authorised under such development order shall cease to have any effect and the land or building shall be reverted to its original use; and
>
> (b) to regulate —
>
> (i) the development and use of any other land which is under the control of the applicant and which is adjoining the

land for which planning permission is to be granted for the development thereof; and

(ii) the works that may be carried out on such other land in the manner and to the extent as may appear to the Commissioner to be expedient with regard to the development for which planning permission is to be granted.

(4) The Commissioner in dealing with an application for planning permission shall take into consideration such matters as are in his discretion expedient or necessary for purposes of proper planning and in this connection but without prejudice to the discretion of the Commissioner to deal with such application, the Commissioner shall as far as practicable have regard to —

(a) the provisions of the development plan and where the local plan has not been adopted, the Comprehensive Development Plan; and

(b) any other material consideration:

Provided that, in the event of there being no local plan for an area and the Commissioner is satisfied that any application for planning permission should not be considered in the interest of proper planning until the local plans for the area have been prepared and adopted under this Act then the Commissioner may either reject or suspend the application.

(5) Upon the receipt of an application for planning permission the Commissioner shall within such time as may be prescribed either grant or refuse the application and when the application is granted subject to condition or refused, the Commissioner shall give his reasons in writing for his decision.

(6) Where a development order is granted, whether with or without conditions, it shall be conveyed to the applicant in the prescribed form.

The section, while conferring a wide discretion upon the appellant in matters of planning in its first subsection, goes on to impose, in its fourth subsection, restrictions on the exercise of that discretion. In particular, for present purposes, it requires the appellant to take into account the several matters set out therein when arriving at a decision. It also recognizes the importance of a reasoned decision by requiring the appellant, in sub-s (5), to state his reasons when refusing an application for planning permission or when granting conditional approval.

Statutes that confer discretion upon a public decision-maker have come before the courts on previous occasions, giving rise to a large body of jurisprudence upon the subject. Hence, the principles that govern a case such as the present are not in doubt. Indeed, counsel before us stand upon common ground in relation to the principles of law that are well-settled and beyond challenge. The difference between them really lies within the narrow confines of the application of those principles to the particular facts of the present appeal.

In our judgment, the present case falls to be decided by reference to the following propositions of law which we consider to be incontrovertible.

First, a public decision-maker — and the present appellant is such a person — upon whom a power or discretion is vested by Parliament is akin to a trustee. He is under an obligation to exercise it reasonably and in accordance with the terms of the relevant statute that confers the power or discretion. It matters not a jot to the principle that the language employed in the conferment of the power or discretion is of wide amplitude. This much was made clear by the Federal Court in *Pengarah Tanah Dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135, considered by all concerned to be the leading case upon the subject. And it is appropriate that we remind ourselves of what fell from the court on that occasion.

Suffian LP, when dealing with the exercise of a discretion conferred upon the Land Executive Committee, said (at p 146):

> In reconsidering these applications, the Committee should act fairly and not arbitrarily. There must be no bad faith and no dishonesty, though in fairness to everybody concerned nobody has suggested that on the part of the Committee. There must be no unreasonableness, no attention to extraneous circumstances, no disregard of public policy, and things of that sort — things mentioned by Lord Greene MR at p 682 in *Associated Provincial Picture House v Wednesbury Corp* [1947] 2 All ER 685.

Raja Azlan Shah Ag CJ (Malaya) explained the principle and its *raison d'etre* in words that are accorded respect that is usually reserved to statutory formulae found in an Act of Parliament (at p 148):

> On principle and authority, the discretionary power to impose such conditions 'as they think fit' is not an uncontrolled discretion to impose whatever conditions they like. In exercising their discretion, the planning authorities must, to paraphrase the words of Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 685 have regard to all relevant considerations and disregard all improper considerations, and they must produce a result which does not offend against common sense; or to repeat Lord Denning MR's words in *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1958] 1 All ER 625, approved in *Fawcett Properties Ltd v Buckingham County Council* [1960] 3 All ER 503, the conditions to be valid must fairly and reasonably relate to the permitted development. The dictum of Lord Denning MR has been frequently quoted and followed in these matters. See *R v Hillingdon Council, ex p Royco Homes Ltd* [1974] QB 720. Lord Denning said (at p 572):
>
> > 'The principles to be applied are not, I think, in doubt. Although the planning authorities are given very wide powers to impose "such conditions as they think fit", nevertheless the law says that those conditions, to be valid, must fairly and reasonably relate to the permitted development. The planning authority are not at liberty to use these powers for an ulterior object, however desirable that object may seem to them to be in the public interest.'
>
> Applying the principles stated above, what is the effect of the condition under consideration? I read the affidavit of the chairman of the Land Executive Committee as claiming an unfettered discretion to grant or reject any application under s 124 or impose such conditions or other requirements as the Committee think fit. I cannot subscribe to this proposition for a moment. *Unfettered discretion is a contradiction in terms.* My understanding of

> the authorities in these cases, and in particular the case of *Pyx Granite* and its progeny compel me to reject it and to uphold the decision of the learned judge. It does not seem to be realized that this argument is fallacious. Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject against departmental aggression. In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen: so that the courts can see that these great powers and influence are exercised in accordance with law. I would once again emphasize what has often been said before that 'public bodies must be compelled to observe the law and it is essential that bureaucracy should be kept in its place' (per Danckwerts LJ in *Bradbury v London Borough of Enfield* [1967] 3 All ER 434 at p 442). (Emphasis added.)

Second, where the exercise of a discretion is challenged on grounds of *vires*, that is illegality, or unreasonableness, the court is not confined merely to the decision-making process, but may examine the merits of the decision itself. The clouds of uncertainty that had pervaded this area of the law have now been swept away by the landmark decision of the Federal Court in *R Rama Chandran v Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145. We have applied it in this court on several occasions. See, for example, *Majlis Perbandaran Seberang Perai v Tropiland Sdn Bhd* [1996] 3 MLJ 94. It has very recently been affirmed by another division of the Federal Court in *Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789.

Third and lastly, a public decision-maker whose exercise of discretion is questioned must meet the challenge by adducing relevant and admissible evidence. Applications for certiorari and the other relief specified in para 1 of the Schedule to the Courts of Judicature Act 1964 are normally contested on affidavit evidence. As a general rule, where an applicant files an affidavit alleging that a particular decision was not arrived at in accordance with law, eg because the decision-maker had taken into account irrelevant matters, it is incumbent upon the particular decision-maker in the usual way to affirm and file an affidavit rebutting the allegation and setting out those matters which led him to make the impugned decision. Of course, procedurally speaking, there is no power in the court to direct a party to affirm and file an affidavit. Parties to a litigation have conduct of their case and the court cannot compel either side to file affidavits. See *Minister of Labour, Malaysia v Sanjiv Oberoi* [1990] 1 MLJ 112.

There may, of course, be good reasons for the absence of an affidavit from the particular decision-maker, eg because he is dead. Or it may be a case where an affidavit from the decision maker is unnecessary. Thus, a Chairman of the Industrial Court is not expected to file an affidavit in rebuttal to an application to quash his award.

But, where no cogent reasons are proffered by way of admissible evidence for the absence of such an affidavit, the general rule will apply with full force. Consequently, where allegations on affidavit are unrebutted by the party against whom they are made, a court is entitled to conclude

A that those allegations have been accepted. See *Rama Chandran*, per Edgar Joseph Jr FCJ at p 229.

There is another aspect to this principle. It is that the affidavit, in order to amount to a satisfactory rebuttal, must be affirmed by the person who has personal knowledge of the facts in issue. In cases where the B exercise of discretion by a public decision-maker is challenged, in the absence of those special circumstances which we referred to a moment ago, the rebuttal must come from the decision-maker himself. An affidavit by a deponent who has no personal knowledge of the considerations upon which the decision was based is pure hearsay and is worthless as evidence and no court can be expected to pay the slightest attention to it.

C Further, subject to certain well-established exceptions to which we will advert in a moment, a public decision-maker must, if he elects to file an affidavit, make full and frank disclosure of the basis upon which he arrived at his decision. Cases where such disclosure cannot be required include those involving national security or those falling within the purview D of the doctrine of public interest immunity. See *R v Lewes Justices, ex p Home Secretary* [1973] AC 388.

These principles are, as we earlier observed, well-established. If authority is needed to support them, it is to be found in the following cases.

E In *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544, Cooke P (now Lord Cooke of Thorndon), when dealing with an application for judicial review said (at p 553):

> The court does not have the advantage of an affidavit from the Minister. There is an affidavit by Dr Allen, sworn on 25 July 1988, which includes F some claims as to what was the Minister's view and what he took into account. This kind of opinion or hearsay evidence of what was in the mind of someone else is inadmissible, as pointed out in *Fiordland Venison Ltd v Minister of Agriculture and Fisheries* [1978] 2 NZLR 341 at p 345. The draftsman of the affidavit seems to have ignored or overlooked that judgment, although in its general nature that case bears quite a close resemblance to G the present one and concerned the same Government Department. The very inclusion of these statements in the affidavit suggests a sense that the court should be informed of the Minister's thinking. It seems desirable to repeat what was said in *Fiordland Venison* at p 346:
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> > '... administrative law is not a formal or technical field, but one in which it is vital for the court to be as fully informed as reasonably H possible of the facts and issues as they presented themselves at the time to the authority whose decision is under review.'

At p 554 of the report, the learned judge is quoted as saying this:

> One can understand that a Minister may be reluctant to expose himself to cross-examination but cross-examination is not permitted as of right in I judicial review proceedings, and in my opinion the court should not allow a Minister to be cross-examined in such proceedings unless this is clearly necessary to enable the case to be disposed of fairly. Compare *Goodman Fielder Ltd v Commerce Commission* [1987] 2 NZLR 10 at p 20. Another course open to the court is simply to decline to allow a Minister's affidavit to be read if he is not willing to be cross-examined. Ultimately, the choice is the Minister's. No one can force him to give evidence. But of course our

> system of government involves the rule of law. When a Minister's handling of a particular matter has naturally given rise to serious doubts about whether he has had regard to the obligations placed on him by Parliament, refraining from being prepared to justify himself in court can serve to strengthen misgivings, as well as rendering the court's task more difficult. As this case should demonstrate yet again, the courts recognise that they should not trespass into the legitimate policy sphere of Ministers. The constitutional corollary should be Ministerial candour with the courts about their policy. This does not seem too much to ask.

In *R v Barnsley Metropolitan Borough Council, ex p Hook* [1976] 1 WLR 1052 at p 1058, Lord Denning said:

> Then Mr Howard, on behalf of the corporation, said that these two matters (which I have mentioned) — the presence of the market manager and the excessive penalty — were not mentioned in the grounds on which Mr Hook applied for certiorari to the Divisional Court. That is correct. But I think he should still be able to raise them. It must be remembered that, in applications for certiorari, the applicant knows very little of what has happened behind the scenes. He only knows that a decision has been taken which is adverse to him, and he complains of it. His statement of grounds (filed under RSC O 53 r 1(2)) should not be treated as rigidly as a pleading in an ordinary civil action. If the Divisional Court give leave (as it did here) the practice is for the respondent to put on affidavits the full facts as known to them. The matter is then considered at large upon the affidavits. If there then appear to be other grounds on which certiorari may be granted, the court can inquire into them without being bound by the grounds stated in the original statement. The Divisional Court will always look into the substance of the matter. So here. On the case as it has developed in this court, it seems to me that the Barnsley Corporation, in all good faith but erroneously, have taken away this man's licence to trade without justification and without having that due inquiry which the law requires.

In *Madhya Pradesh Industries Ltd v The Income Tax Officer, Nagpur* AIR 1970 SC 1011 at p 1015, Hegde J — after discussing the decisions of the Indian Supreme Court in *Narayanappa v Commissioner of Income Tax, Bangalore* AIR 1967 SC 523 and *Kantamani Venkata Narayana & Sons v First Additional Income Tax Officer, Rajahmundry* AIR 1967 SC 587 — said:

> In these cases, the company in its writ petitions had repudiated the assertion of the income tax officer that he had reason to believe that due to the omission or failure on the part of the company to give material facts, some income had escaped assessment. Under those circumstances, one would have expected the officer who issued the notices under s 34(1)(a) to file an affidavit setting out the circumstances under which he formed the necessary belief. We were told that one Mr Pandey had issued the notices in question. That officer had not filed any affidavit in these proceedings. The proceedings recorded by him before issuing the notices have not been produced nor his report to the commissioner or even the commissioner's sanction has not been produced. Hence, it is not possible to hold that the income tax officer had any reason to form the belief in question or the reasons before him were relevant for the purpose. We have no basis before us to hold that the income tax officer had jurisdiction to issue the impugned notices. Hence, the proceedings taken by him have to be quashed.

Closer to home, the Federal Court in *Rama Chandran* has expressed similar views. Edgar Joseph Jr FCJ, who formed the majority, said (at pp 229–230):

Now, at an application for judicial review, evidence is normally presented in the form of affidavits. I must therefore touch on the appreciation of affidavit evidence in judicial review proceedings.

In England, the Divisional Court labours under no *inherent* disability to resolve disputed facts. The observation that judicial review process is unsuitable for resolving factual disputes ought not, therefore, to be overstated.

In the book entitled *Judicial Review* by Michael Supperstone QC, and James Goudie QC, under the topic of 'Evidence', I find the following passage (at p 378):

> 'The fact that evidence is given by affidavit does not mean that the court is unwilling or unable to resolve any disputes of fact that should arise. Where there is a conflict of evidence on the affidavits, but the probabilities can be shown to favour one account over the other, the court can act on that factual footing.'

In this, I think, the authors are correct. I note, for example, in *Chief Constable of North Wales Police v Evans* [1982] 1 WLR 1155 (HL), there was a 'conflict of evidence as to the interview', as to which, on appeal to the House of Lords, Lord Bridge (at p 1165F) preferred Evans's version 'on the probabilities'. So also, in *Leech v Deputy Governor of Parkhurst Prison* [1988] AC 533, the ability to resolve factual disputes was a central point of the rejection of *R v Deputy Governor of Camphill Prison, ex p King* [1985] QB 735.

Applying the principles we have discussed thus far to the facts of the present appeal, we arrive at the following conclusions.

In the first place, there is no doubt that s 22 by its terms confers a discretion upon the appellant in matters of planning approval. But it is not an unfettered discretion because Parliament has directed that the appellant should take into account certain considerations before making his decision whether to grant or to refuse approval.

Secondly, we are in agreement with Dato' Zaki's submission that the question whether planning approval should be granted or refused is a matter for the appellant to decide. He has access to material and information which is, for good reason, denied this court. We therefore agree that it is not the function of the court to determine how the planning of Kuala Lumpur should take place.

Thirdly, since it is for the appellant to make the determination on issues of planning approval, it is for him, when challenged, to set out the matters he took into account when arriving at his decision so as to satisfy the court that he acted in accordance with law. This he must do, in the ordinary way, by filing an affidavit explaining the circumstances that affected his decision. On the authorities, he cannot be compelled to provide an affidavit. But if he does not do so, the usual consequences, to which we have earlier adverted, must follow and the court must be left to decide the case on such admissible evidence as is made available to it.

Here the appellant has not filed any affidavit. Nor has any, or any sufficient, reason been advanced in the affidavit to justify this failure. We may add that this case does not fall within any of the exceptions earlier discussed. There is also no valid reason not to place the facts before the learned judge. There is no suggestion that questions of national security or public interest immunity are involved. They are not.

All that the learned judge had before him was an affidavit deposed to by one Mokhtar bin Long Idris, affirmed on 4 March 1994. He is the person who conducted the inquiry attended by the respondent's solicitor. In this affidavit, the deponent purports to set out the reasons why Tradium received planning approval. But it is the appellant's case that the decision to grant Tradium planning approval was made by none other than the appellant himself. In these circumstances, all that Mokhtar bin Long Idris had to say about the matter was pure hearsay.

The point was taken before the learned judge and finds mention in judgment. Unfortunately, he did not deal with it. But it remains a live issue and has been properly re-agitated before us. We are therefore entitled to deal with it.

The upshot is that there was absolutely no admissible evidence in the record provided to us on the critical issue in this case, namely whether the discretion was exercised in accordance with law. The respondent must, therefore, be held to have established his case.

Dato' Zaki's submission that it is open to this court, on the material made available, to hold that discretion has been properly exercised in this case, while attractive at first blush, contains a fallacy. It is this.

The material referred to and relied upon by him is contained in an affidavit which is hearsay and therefore inadmissible. So one returns to the point where one began. The court can hold an administrative action to be reasonable provided there is admissible evidence to support such a conclusion. There is simply no such evidence in the present case and we are accordingly precluded from entering upon that course of inquiry.

Having read the record of appeal with care and having given the submissions of counsel our most anxious consideration, we are compelled to conclude that this appeal is without merit and must fail.

We wish to say a few words on the question of costs. This is a case where the appellant has established that the learned judge was wrong in his reasons for issuing certiorari. The respondent therefore succeeded before the learned judge for the wrong reason. Before us he succeeds on other grounds. Taking into account these and all other circumstances, we think that this is a proper case in which there should be no order as to costs here as well as in the court below.

For the foregoing reasons, the appeal is dismissed. All orders made by the learned judge, save the order as to costs, are affirmed. Each party shall bear his own costs here and in the court below. The deposit, if any, paid into court by the appellant shall be refunded to him.

Appeal dismissed.

Reported by K Tang-Wai